



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

FILED

10/31/22

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K2210024

Appeal of Orange County Power Authority to
Citation No. E-4195-0125, issued on
September 16, 2022, by the Consumer
Protection and Enforcement Division.

**NOTICE OF APPEAL OF ORANGE COUNTY POWER AUTHORITY
FROM CITATION NO. E-4195-0125**

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October 17, 2022

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Pursuant to Resolution ALJ-377 and Resolution E-4195, Orange County Power Authority (“OCA”) hereby provides this Notice of Appeal, and a request to submit testimony and for an evidentiary hearing concerning Citation E-4195-0125 (“Citation”). The California Public Utilities Commission’s (“Commission”) Consumer Protection and Enforcement Division (“CPED”) issued the Citation on September 16, 2022, regarding OCA’s September 2022 Month-Ahead Resource Adequacy (“MARA”) submission. This notice has been submitted to the Commission within 30 days from the Citation’s issuance, and is timely filed within 30 days on October 17, 2022.

OCA respectfully requests that the Commission dismiss its Citation on the grounds, among other things, that it was impossible for OCA to comply with its September 2022 MARA allocation by the respective deadlines imposed by the Commission. As described herein, OCA experienced an unconscionable procurement environment specific to Community Choice Aggregators (“CCA”) as a new market entrant and small retail seller, and impacts from a tightening market where RA was unavailable for purchase. OCA sought to procure RA through multiple solicitations and even past the Commission’s deadlines up to the month of re-filing. OCA also encourages the Commission to consider its policy discretion in this area to dismiss the Citation or

reduce the penalties, including consideration of OCPA's new LSE status and size, among other factors.

I. LEGAL STANDARD

A. Burden of Proof

CPED has the burden to prove by a preponderance of the evidence that a violation occurred and OCPA, as appellant, has the burden to prove its affirmative defenses, which may challenge the issuance of the citation and the appropriateness of the penalty amount. While Resolution E-4195 acknowledges that Commission Staff bears the burden of proof, Resolution ALJ-377, which governs the Commission's citation appeal rules provides the default burden applicable in this appeal. Specifically, Rule 11 of ALJ-377 states that:

The burden of proof in a Citation Appeal or a General Order 156 Appeal is governed by the language in the Citation Program or General Order 156. For Citation Programs which are silent as to which party has the burden of proof, the following rule applies:

Staff has the burden of proof by a preponderance of the evidence and accordingly shall open and close the hearing. Respondent/Appellant has the burden to prove affirmative defenses it might raise. The Administrative Law Judge may, in his or her discretion, alter the order of presentation at the hearing.¹

While neither Resolution E-4195 or ALJ-377 provides precise guidance concerning what an appellant must show to support its affirmative defenses, the Commission's original appellate rules as a pilot program set forth in Resolution ALJ-299 are edifying. Although the pilot program

¹ Resolution ALJ-377, Rule 11

was made permanent under Resolution ALJ-377, Rule 11 of the ALJ-299 pilot program was only modified slightly. Under the prior resolution, Rule 11 explained that the default burden of proof that applied when a citation program was silent on the matter was that, “[s]taff has the burden to prove a *prima facie* case supporting its issuance of the citation for the alleged violation; the burden then shifts to appellant to demonstrate that a violation did not occur and the citation should not issue or that the amount of the penalty is inappropriate.”² Because the revised language in ALJ-377 only changed the staff’s burden of proof from *prima facie* to preponderance of the evidence, there is nothing in these changes that suggests the Commission intended to modify what a party must prove in the appeal. When the resolutions are read in successive context, it is clear that the Commission intended that staff has the burden to prove by a preponderance of evidence that the violation occurred, and the appellant has burden to prove any affirmative defenses, which may challenge the issuance of the citation and the appropriateness of the violation amount.³

B. Affirmative Defenses

1. Impossibility

In Resolution ALJ-382 resolving Appeal K.19-03-024 of Citation No. E-4195-0052 issued to San Jose Clean Energy, the presiding ALJ recognized the doctrine of impossibility as a defense to an RA procurement deficiency⁴ The Commission has since vacated ALJ-382, but did so specifically to allow SJCE the opportunity to present detailed factual evidence in support of its claim of impossibility.⁵ Furthermore, the doctrine of impossibility of performance has been widely recognized in contract law as well as in regulatory matters. Although the Commission can consider

² Resolution ALJ-299, June 26, 2014 at 12.

³ See, K. 21-03-005, Second Opening Brief of San Diego Community Power, at 1-3.

⁴ Resolution ALJ-382 at 4 (September 10, 2020).

⁵ D. 21-12-066, Order Granting Rehearing Of Resolution AL-382 And Vacating Resolution, at 6.

other Commission-established standards in evaluating this Appeal,⁶ OCPA meets the criteria for impossibility standard and its penalty can and should be dismissed.

Within the doctrine of impossibility is also the sub-doctrine of commercial impracticability. The doctrine of impossibility has been expanded by the courts to include not only those actions that a party could not perform by any means, but also actions that are impracticable for a party to perform due to unreasonable and excessive cost, or other unreasonable terms and conditions.⁷ A just and reasonable application of the impossibility doctrine must also include commercial impracticability.

The sub-doctrine of commercially impracticability applies where performance is commercially infeasible or extremely burdensome for the party to perform, and a party to a contract in California may be excused from a contractual breach by the commercial impracticability.⁸ When disparate market power causes system capacity markets to fail, the Commission must equally consider market conditions in its assessment of all penalties for non-compliance for those RA deficiencies. In establishing the local RA waiver procedure, the Commission found that, “measures that are proposed to promote greater grid reliability should be evaluated by weighing their expected costs against the value of their expected contribution to reliability.”⁹ Through the Commission’s adoption of the local RA waiver process, the Commission implicitly acknowledges that market factors beyond LSEs’ control may cause prices to reach exorbitant levels that excuse some RA procurement performance under its enforcement guidelines.

⁶ See, D.05-10-042 at 8 (noting that the concept of “reliability at any cost” is not a policy option).

⁷ *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 293 (1916).

⁸ Uniform Commercial Code (“UCC”) § 2-615; See also *City of Vernon v. City of Los Angeles*, 45 Cal. 2d 710, 719 (1955), citing to *Mineral Park Land Co. v. Howard*, 172 Cal. 289 (1916).

⁹ D.05-10-042 at 8.

The Commission established the local RA waiver process because it was “necessary as a market power mitigation measure.”¹⁰ In effect, the Commission has built an RA market that encompasses commercial impracticability as a core tenant of the market dynamics it deigns to promote. The Commission’s disparate treatment of local RA deficiencies, as opposed to system or flex RA deficiencies is arbitrarily imposed. By the Commission’s own standards, deficiencies in flex and system RA procurement are not strict liability offences and should not be treated as such.

2. Commission Policy Favors Consideration of Penalty Mitigation under Resolution E-4195, Public Utilities Code Section 380 and the Commission’s Five Factor Analysis

The issuance of a citation for a specified violation is not mandatory. In enforcing compliance with Resource Adequacy filing requirements, or in response to any specified violation, the Commission may initiate any authorized formal proceeding or pursue any other remedy authorized by the California Constitution, the Public Utilities Code, other state or federal statutes, court decisions or decrees, or otherwise by law or in equity.¹¹ Moreover, Public Utilities Code section 380 affords the Commission with broad discretion over the RA program, including reducing or eliminating unjust regulatory penalties. The Commission is authorized to determine “the most efficient and equitable means” for achieving the program’s goals and to use its enforcement power to ensure compliance.¹²

With this mandate, the Commission established the RA program’s procurement obligations as a means for achieving the program’s goal of minimized reliance on CAISO backstop procurement and adopted the RA penalty program to induce LSE compliance with those

¹⁰ D.06-06-064 at 71.

¹¹ Resolution E-4195 at 8.

¹² Public Utilities Code § 380(e) and (h).

obligations.¹³ In this case, the penalty cannot induce OCPA's compliance and will not advance the RA program's goal since there was no commercially reasonable available resources to be purchased. The Commission has just and reasonable policy grounds for exercising its discretion not to assess the penalty or the full penalty amount.

Section 380 also addresses enforcement by requiring the Commission to enforce RA requirements in a non-discriminatory and effective way:¹⁴ In adherence to the notion of a non-discriminatory enforcement mechanism, the Commission has faithfully employed a multi-pronged analysis to determine whether an enforcement citation is just and reasonable. Commission D. 98-12-075 established standards and procedures for violations of the Commission's affiliate transaction rules, among others, and included broad guidance related to fines, investigations and complaints. After deliberating the development of the appropriate guidance on regulatory fines, the Commission developed, "principles that reflect the past practices of this and similar regulatory agencies," for such violations.¹⁵ The Commission refined these principles into a practical legal test that contains five factors, which has been applied throughout a broad swath of the Commission's citation and enforcement determinations:

In establishing the appropriate fine, the principles call for the Commission to take into account the severity of the offense, the conduct of the utility (before, during and after the offense), the financial resources of the utility and the totality of circumstances related to the violation.¹⁶

¹³ Public Utilities Code § 380(h)(7); D. 05-10-042 at 93-94 (finding the system RA penalty program "appropriate to induce compliance with the RA obligation."); D. 06-06-064 at 66.

¹⁴ Cal. Pub. Util. Code § 380(e).

¹⁵ D. 98-12-075 at 4.

¹⁶ D. 98-12-075 at 4, 27-29.

The courts similarly consider four factors to determine if a penalty is excessive: (1) the party's culpability, (2) the relationship between the harm and the penalty, (3) the party's ability to pay, and (4) penalties imposed in similar statutes.

Moreover, the five factor test has been applied by the Commission in enforcement actions for violations of RA program requirements. For example, the Commission applied the five factor test in D. 12-02-030 when it approved a settlement agreement between PG&E and the Consumer Protection and Safety Division related to RA procurement deficiencies, which included a fine for \$215,000.²⁰ The Commission has expansive authority over the enforcement of the RA program under Public Utilities Code section 380, which clearly includes the authority to reduce or eliminate fines.

II. FACTUAL BACKGROUND

OCPA is a California Joint Powers Authority formed in accordance with Government Code section 6500 *et seq.* (Joint Exercise of Powers Act) and Public Utilities Code section 366.2, established in November 2020 to implement a community choice aggregation ("CCA") program for electric customers within the jurisdictional boundaries of its members and ratepayers. OCPA filed its Implementation Plan and Statement of Intent ("Implementation Plan") with the Commission on December 28, 2020 and obtained certification on March 8, 2021. OCPA initiated retail electric service to non-residential customers in April 2022 and initiated service to its residential accounts in October 2022. OCPA services customers located within the cities of Buena Park, Fullerton, Huntington Beach, and Irvine, and will initiate service to the County of Orange unincorporated area in October 2023 ("Member Agencies"). OCPA is a new CCA and market entrant that began serving load in April of 2022. OCPA is a new CCA and market entrant that began serving load in April of 2022. It is considered a small retail seller consisting of

approximately 291,000 total residential and non-residential accounts with an annual load of 3,074 GWh.

A. OCPA's RA Procurement Efforts

OCPA began evaluating its RA market options for procuring RA in the Spring of 2022 to satisfy its September 2022 MARA obligation. Identical to its prior September 2022 RA procurement challenges raised in its prior appeal, OCPA was unable to procure the required amounts for September 2022. On September 16, 2022, OCPA received a citation for its remaining RA deficiencies for \$415,406.40, despite commercially reasonable efforts. OCPA has been unable to procure its entire RA obligation sufficient to meet its September 2022 compliance obligation due to a number of unique issues including insufficient market supply and market withholdings. In accordance with the direction of the OCPA Board of Directors to comply with the Commission's RA obligations, OCPA has attempted to procure all RA available to it and has found it impossible to do so.

III. BASIS FOR APPEAL

OCPA appeals the Citation on the following grounds:

1. OCPA experienced circumstances where it was not possible to procure September 2022 Month Ahead Resource Adequacy despite commercially reasonable efforts to do so.
2. The California RA market is failing to allocate sufficient RA for all LSEs to meet State compliance obligations and new market entrants are at a procurement disadvantage.
3. The Commission has discretion to dismiss or reduce the Citation based on an affirmative defense of impossibility and other Commission policies.

4. The Citation penalty is excessive and does not serve the public interest given the size of OCPA and that it is only in its first year of service.

IV. DISCUSSION

A. OCPA Experienced Circumstances Where it Was Not Possible to Procure September 2022 Resource Adequacy Despite Commercially Reasonable Efforts

OCPA undertook an exhaustive effort to procure system RA, but the product necessary to fulfill its regulatory allocation was not available prior to the September 2022, Month Ahead deadline. As described above, and will be provided in more detailed testimony, OCPA engaged in commercially reasonable efforts and was unable to procure the required RA.

B. The California RA Market Is Failing to Allocate Sufficient RA For All LSEs to Meet State Compliance Obligations and New Market Entrants Are at a Procurement Disadvantage

The California RA market is exhibiting signs of market failure, which has resulted in capacity supply shortages. Market failure is clearly present when there is (1) disparate market power between market actors; (2) resource withholding; (3) volatile and inexplicable price variations; (4) a dearth of resource availability specifically during critical compliance periods; and (5) informational asymmetries between market actors.

In D.19-06-026, the Commission recognized that elements of market failure are present in the RA market, acknowledging that there are, “significant, unresolved issues that require further consideration. . . including potential leaning by LSEs and market power issues. Such market power issues may include potential gaming by generators that may, for example, withhold capacity during more expensive peak months.”¹⁷ Dysfunctional market power occurs when either the buyer or the seller possesses undue power that determine the price of goods or services in a market. This type

¹⁷ D.19-06-026 at 18.

of market dysfunction prevents the natural forces of supply and demand from setting the prices of goods in the market. Disparate market control between actors in the California RA market exists both between CCAs and ESPs relative to incumbent IOUs, which are the primary holders of capacity, as well as between established CCAs that serve relatively large loads compared to smaller CCAs, like OCPA, that have only begun to serve load recently.

There is no question that the California RA market is an inefficient market—its function is premised on market dysfunction imbued by an imbalance of supply and demand—a market intended to ensure that LSEs acquire and clear a market of extraordinarily scarce energy resources to support a more reliable energy grid. To protect good faith market actors, this dysfunction requires that the Commission excuse the inability of an LSEs commercially reasonable attempts to obtain every last drop of those scarce resources. In a June 2019 ruling in the Integrated Resource Planning (“IRP”) proceeding, the Commission found that “. . . many market participants have informally observed a tightening of the bilateral market. In addition, according to Commission staff, there has been a decline in the robustness of competitive solicitations. Finally, a number of LSEs have not been able to comply with the system requirements for the recent resource adequacy compliance years.”¹⁸ While OCPA recognizes that the Commission is continuing to address issues of market power and inadequate RA supply, in many instances it has been impossible for new market entrants that are not principal capacity holders and do not have any market size or position to procure sufficient quantities to meet its RA allocation.

C. The Commission Should Dismiss or Reduce the Citation Based on its Broad Discretion to Revise the Penalty in Light of Dysfunctional Markets Dynamics

¹⁸ *Assigned Commissioner and Administrative Law Judge’s Ruling Initiating Procurement Track and Seeking Comment on Potential Reliability Issues*, R.16-02-007 (June 20, 2019).

The Commission recognizes the doctrine of impossibility as a valid affirmative defense in an LSE's appeal of an RA citation, which it should apply in this appeal.¹⁹ The factual circumstances that led to the citation against OCPA, as described herein, indicate that the Commission should dismiss the citation penalty due under this doctrine. The Commission also has discretion through other policies to limit RA penalties. For example, the Commission has previously determined and reconfirmed that LSEs should not be obligated to procure capacity that does not exist.²⁰ The Commission has also found that it "cannot neglect our other primary public duty: protection of ratepayers from excessive charges," and that LSEs should not be placed in a position whereby they would have to pay any price to acquire the capacity needed for their RA obligations.²¹

Penalizing OCPA for contract, data and market conditions outside of its control would be inequitable and could hinder progress towards the Commission's RA goals. OCPA's procurement efforts were commercially reasonable, and assessing a penalty in this particular case would be inconsistent with other Commission policies. A penalty of this magnitude incentivizes other LSEs to weigh the price of a RA transaction versus the Commission's trigger price and rely on backstop procurement, even with the most recent modifications to the RA penalty program. Given its broad authority over the RA program and enforcement, the Commission should assess no penalty against OCPA or reduce the penalty by a proportionate amount given the unique factual circumstances.

¹⁹ Resolution ALJ-382 at 4.

²⁰ See D.06-06-064 at 21-22 ("We take this approach to deficiencies because we do not find it reasonable to require LSEs to procure capacity that, according to the LCR study, does not currently exist in an area."); D.10-06-036 at 64.

²¹ D.04-10-035 at 15, D.05-10-042 at 66.

D. The Penalty is Excessive and Does Not Serve the Public Interest Given the Size of OCPA and That It Is Only in Its First Year of Service

The Commission must conduct a full and factual analysis under the five factor test. D.98-12-075 identified five factors for the Commission to consider in the assessment of fines: (1) the severity of the offense, (2) the entity's conduct, (3) the entity's financial resources, (4) the role of precedent, and (5) the totality of circumstances in the public interest. While OCPA will brief these issues before the Commission later in the proceeding, the \$415,406.40 penalty levied against OCPA is excessive for a relatively small CCA, which is only in its first year of service as an LSE, and has a constrained budget whereby the proposed penalty would create significant financial difficulties.

V. PROCEDURAL REQUEST

OCPA requests that it be allowed to submit prepared testimony containing its procurement efforts and the circumstances that gave rise to it being impossible to procure system RA for September 2022. It also requests an evidentiary hearing if there are disputed material facts regarding this Citation. OCPA also requests use of the Commission's alternative dispute resolution ("ADR") mechanism with respect to the circumstances in this Citation to determine whether penalties are appropriate.

VI. CONTACT INFORMATION

Copies of all pleadings, notices, rulings, orders and other correspondence in this proceeding may be served on:

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VII. CONCLUSION

For the reasons stated above, Orange County Power Authority respectfully requests that the Commission dismiss Citation E-4195-0125.

October 17, 2022

Respectfully submitted,

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